

DEC 9 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

AMERICAN SAFETY CASUALTY
INSURANCE COMPANY, a foreign
corporation,

Plaintiff - Appellant,

v.

CITY OF BONNEY LAKE, a municipality,

Defendant - Appellee.

No. 02-36021

D.C. No. CV-01-05708-FDB

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Submitted December 3, 2003**
Seattle, Washington

Before: BRUNETTI, T.G. NELSON, and GRABER, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

The parties are familiar with the facts and we do not recite them here.

Because American Safety did not discharge any of Katspan's obligations to the City of Bonney Lake, such as by completing the construction project for Katspan, American Safety is not subrogated to any of Katspan's rights. In Johnson Service Co. v. Roush, 355 P.2d 815, 822-823 (Wash. 1960), the Washington Supreme Court stated that when a contractor fails to pay certain laborers, a surety who satisfies the laborers' claims is subrogated only to the laborers' rights. The court found that a surety's rights "can rise no higher than [the laborers']". Id. at 823. Furthermore, in North Pacific Bank v. Pierce County, the Washington Supreme Court clearly stated, "[a] surety on the bond of a contractor engaged in public work has no stronger claim upon the funds *due the contractor* for work done *than have labor or material claimants*." 167 P.2d 454, 459 (Wash. 1946) (emphasis added). Because Washington law grants labor and material claimants rights only to the statutory retainage, American Safety can only recover that amount. This is the risk American Safety takes and this is why American Safety does not have a cause of action against the City on this theory.

American Safety's complaint did not allege a right to an assignment to the remaining progress payments owed by the City. Moreover, none of American Safety's notices to the City informed it that American Safety was entitled to

payment because of the indemnity agreement or any other theory. Lastly, the contract between Katspan and the City had a non-assignment clause.

Accordingly, the district court did not err in granting the City of Bonney Lake's Rule 12(b)(6) motion.

AFFIRMED.